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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

STEVE DAVIS,

Plaintiff, and Appellant,

v.

KGO-T.V., INC.,

Defendant and Appellant.

A068644, A070030

(San Francisco County Super. Ct. No. 946879)

Steve Davis filed a complaint against KGO-T.V., Inc. ("KGO") and its owner, Capital Cities/ABC, Inc., seeking damages for unlawful age discrimination resulting in his termination as an employee with KGO. A jury returned a verdict against KGO, but in favor of Capital Cities. The jury found that Davis had suffered damages in the amount of $484,579, but reduced its award to $260,160, finding that Davis could have earned that amount had he made reasonable efforts to obtain substitute employment. The trial court denied Davis's motion for a partial judgment notwithstanding the verdict or for a new trial on the issue of damages for lost future earnings. It also denied KGO's motions for judgment notwithstanding the verdict and for a new trial. The court thereafter entered judgment for Davis in the amount of $260,160, and further awarded Davis costs and attorney fees of $49,691.38 and $290,030, respectively. KGO appeals from the judgment and from the orders denying its motion for a new trial and for judgment notwithstanding the verdict. Davis appeals from the order denying his motion

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* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of parts I through IV and Davis's Cross-Appeal.

for a partial judgment notwithstanding the verdict or for a new trial on the issue of damages. The appeals have been consolidated, and both are considered here.

FACTS

Davis worked at KGO since 1971. He became a senior reporter in 1981 and remained in that position until his termination in 1990. Prior to his termination, Davis had worked under seven news directors and at least five general managers. In 1988, James Topping became president and general manager of KGO. In May 1990, Milt Weiss became the station's news director. In November 1990, Weiss terminated Davis's employment, canceling what apparently was the last year of a five-year contract between Davis and KGO. Weiss testified that he terminated Davis because of his belief that Davis's reporting style did not meet KGO's standards, which required reporting to be fast-paced, organized and structured, kind of "show-biz." Weiss nonetheless hired Davis on a part-time free-lance basis for another year, beginning in February 1991. Davis had been working on a shift that began at 10 a.m. In April, three new, younger reporters were hired and Davis was moved to the 5 a.m. shift. The result was that Davis was working a less desirable shift and ended up working longer hours without additional compensation. The longer hours became an issue that finally was resolved, but Davis remained unhappy with the 5 a.m. shift. In October 1991, he told Weiss, " 'I may live to regret this, but I think keeping me on the 5:00 a.m. [shift] is a waste of my time and your money.' " Weiss told Davis that he was interested in having Davis do some "Focus" programs that Weiss contemplated initiating on the 6 o'clock evening news. Davis wrote a document outlining the agreement he believed he had reached with Weiss regarding his continued free-lance employment with KGO. He forwarded the document to Gene Ross, the assistant news director, but did not hear back from anyone at KGO. Davis continued to work through 1991. In January 1992, Weiss told Davis that Weiss would not be able to use Davis on the Focus programs after all. In the meantime, still other younger reporters had been hired by KGO. Davis's last date of employment with KGO was in February. Davis was then 53 years old.

On October 27, 1992, Davis filed a complaint alleging wrongful termination, claiming he was discharged on the basis of his age, a violation of the California Fair Employment and Housing Act (FEHA), Government Code section 12900 et seq.[1]

KGO'S APPEAL

DISCUSSION

I.

The Verdict is Supported by the Evidence

Where, as here, the action arises from a claim that employment termination resulted from unlawful discrimination, "(1) the complainant must show a prima facie case of discrimination; (2) the employer may then offer a legitimate reason for his actions; after which (3) the complainant is afforded an opportunity to prove that the reason given is a pretext to mask an illegal motive." (*Walker* v. *Blue Cross of California* (1992) 4 Cal.App.4th 985, 998; citing *McDonnell Douglas Corp.* v. *Green* (1973) 411 U.S. 792.[2])

A prima facie case of discriminatory discharge is made when the complainant produces evidence that "(1) complainant belongs to a protected class; (2) his job performance was satisfactory; (3) he was discharged; and (4) others not in the protected class were retained in similar jobs, and/or his job was filled by an individual of comparable qualifications not in the protected class." (*Mixon* v. *Fair Employment & Housing Com., supra,* 192 Cal.App.3d at p. 1318; and see *Walker* v. *Blue Cross of California, supra,* 4 Cal.App.4th at p. 998.) Davis established his prima facie case. Government Code section 12941 makes it unlawful to discharge an individual over the age of 40 on the

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[1] Government Code section 12941 provides in relevant part, "(a) It is unlawful employment practice for an employer to refuse to hire or employ, or to discharge, dismiss, reduce, suspend, or demote, any individual over the age of 40 on the ground of age, except in cases where the law compels or provides for such action."

[2] California courts also consider federal precedent construing provisions of the Federal Civil Rights Act, to the extent that the such provisions are analogous to those of the FEHA. (*Carr* v. *Barnabey's Hotel Corp*. (1994) 23 Cal.App.4th 14, 18; *Mixon* v. *Fair Employment & Housing Com.* (1987) 192 Cal.App.3d 1306, 1316-1317.)

basis of age. Davis was 52 when he was told that his contract was being canceled, and 53 when he was formally terminated. That Davis's job performance was satisfactory was, of course, a matter of dispute. Davis, however, introduced evidence that his work met or exceeded industry standards. Davis was in fact discharged and other reporters, under the age of 40, were hired during the time Davis was being phased out and after Davis was terminated.

KGO, however, asserts that contrary to the jury's findings in favor of Davis, the evidence supports KGO's theory that Davis was terminated not because of age discrimination, but because of his reporting style. Thus, KGO claims that it asserted a legitimate basis for Davis's termination. This is true, but it does not follow that the jury was required to agree with KGO's assertion, or that the judgment was not supported by the evidence. The question on appeal is not whether there is evidence contradicting the jury's verdict, but whether sufficient evidence supports it. " '[I]n examining the sufficiency of the evidence to support a questioned finding, an appellate court must accept as true all evidence tending to establish the correctness of the finding as made, taking into account, as well, all inferences which might reasonably have been thought by the trial court to lead to the same conclusion. Every substantial conflict in the testimony is, under the rule which has always prevailed in this court, to be resolved in favor of the finding.' [Citation.] [¶] It is not enough that there is more evidence against than in favor of a judgment. [Citation.] 'Of course, all of the evidence must be examined, but it is not weighed. All of the evidence most favorable to the respondent must be accepted as true, and that unfavorable discarded as not having sufficient verity to be accepted by the trier of fact. If the evidence so viewed is sufficient as a matter of law, the judgment must be affirmed.' [Citation.]" (*County of Mariposa* v. *Yosemite West Associates* (1988) 202 Cal.App.3d 791, 807.)

As noted above, Davis introduced evidence that his work met or exceeded industry standards. There was evidence that Davis had received awards for the quality of his stories and reporting during his tenure at KGO. Two well-established anchors

who had worked with Davis and who had a significant amount of television experience, gave Davis high ratings. KPIX news anchor Anna Chavez described Davis's work as intelligent and thoughtful, displaying the ability both to tell complicated stories and to do fast-breaking stories. KRON news anchor Pete Wilson testified that Davis "is one of the three or four best reporters that I've seen in a number of different categories in the course of my 20-plus years in the business." Davis also introduced the testimony of Andrew Stern, professor emeritus in the Graduate School of Journalism at the University of California, at Berkeley. Mr. Stern began working in the television industry in 1961, working for ABC News. Among his many jobs in the industry, Mr. Stern worked as a media critic for KQED television and also for KCBS radio. He worked for an NBC affiliate in Salt Lake City, advising it on its news practices. Mr. Stern has taught or co-taught all of the University's graduate courses on broadcast journalism. Mr. Stern was able to explain to the jury the development of broadcast journalism, and the basic goals of local network news programs. He reviewed a number of tapes of Davis's work, including tapes supplied by KGO as examples of bad work. Mr. Stern testified that in his opinion Davis met the standards of local broadcast news. "I would rate his stories as above average." He rated Davis's poise in front of the camera as "first rate." Davis's writing was "above average in that he had a certain style of conversation in telling of his story which often made more complex stories reasonably understandable." In Mr. Stern's opinion, even the "bad tapes" did not fall below the standards of local news reporting or writing. Stern rated Davis's overall body of work as "well above average, very high on a local level and particularly in this market." Stern stated, "If I interpret the standards of news reporting of KGO as the standard that I have watched, I think he certainly met those standards." Andrew Shinnick worked for KGO from 1981 through early 1990. He was a writer/producer, later executive producer and still later news director and assistant news director at the station. Shinnick has since become the owner of a video production company in San Francisco. He was and is intimately familiar with Davis's work. Shinnick described

Davis as an "excellent writer" and a "very versatile reporter." "[He is] an excellent writer and he's an excellent journalist. And if I were a news director, I'd hire him tomorrow."

The jury was shown a number of examples of Davis's reporting and thus could judge for itself whether, as KGO argued, Davis's "stories were rambling, unfocused, and not suited to the style which the station's management sought to achieve." The jury also was aware that although KGO claimed that it terminated Davis because of his style of reporting, it hired him back as a freelance reporter. In addition, Davis testified that Weiss told him that he was being terminated as a method of saving money, telling him, "It's a money problem. I haven't been here very long. I don't know you or your work very well, but yours is the first window that's come open." In response to Davis's statement that he could not believe he was the worst reporter on the staff, Weiss told him, "Well, you're not. You're somewhere in the middle." In addition, expert witness and statistician William Lepowsky testified that after analyzing the involuntary discharges of KGO general assignment reporters between 1988 (when Topping became general manager) and 1992 (when Davis's relationship with KGO terminated) he formed the opinion that it was statistically likely that age was a factor in the decision to terminate the reporters.

KGO attacks this evidence as insufficient to rebut its evidence that Davis was discharged for legitimate reasons. KGO dismisses the opinions of those in the broadcast industry on the grounds that they demonstrated nothing more than that some people believed Davis to be a good reporter while KGO's management harbored the good-faith difference of opinion that Davis's style was not consistent with the station's goals. The jury, however, was made aware of what KGO said it wanted and had the ability to judge whether Davis was able to render the desired performance. In addition, the testimony that Weiss told Davis that he was not familiar with Davis's work and that Davis's termination was because of budget, and Weiss's later statement that Davis was not the

worst reporter but somewhere in the middle, tended to discredit the theory that Davis was terminated because of his style.

KGO saves its most forceful attack on the evidence for the testimony and opinion of Davis's expert witness, William Lepowsky. KGO contends that absent Lepowsky's testimony, the record fails to support the claim that Davis was terminated because of his age. It follows, in KGO's opinion, that the verdict was incorrect, the judgment is not supported by the evidence and the court should have granted KGO's motion for judgment notwithstanding the verdict. Contrary to this contention, the record contains sufficient evidence to support the verdict even without Lepowsky's testimony. In all events, KGO's arguments against the admissibility of Lepowsky's testimony are unfounded.

There is no question but that Lepowsky qualified as an expert witness, and is able to design and perform statistical analyses.[3] KGO, however, contends that Lepowsky's analysis of the evidence was faulty. KGO criticizes the method of statistical analysis employed by Lepowsky, claiming that the method employed by its own expert provides a more accurate measure of the probability that age was a factor in the termination of KGO employees. KGO also contends that Lepowsky erred in restricting the pool of employees he analyzed to general assignment reporters. Finally, KGO contends that Lepowsky erroneously concluded that several of the reporters within that pool were terminated involuntarily.

On appeal, the question is whether the trial court abused its discretion in admitting the expert testimony. (*Korsak* v. *Atlas Hotels, Inc*. (1992) 2 Cal.App.4th 1516, 1523.) In deciding that issue, we are guided by settled principles. "A trial court

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[3] Lepowsky majored in math at Harvard, graduating summa cum laude in 1967. He received a master's degree in mathematics from the University of California at Berkeley in 1968, and has taught mathematics and statistics since 1969. Lepowsky received a master's degree in statistics from Berkeley in 1976. He is a member of the American Statistical Association and the California Mathematics Council for Community Colleges.

may, and upon objection must, exclude opinion testimony that is based in whole or in significant part on matter that is not a proper basis for such an opinion. (Evid. Code, § 803.) In that case, the witness may state his opinion after excluding from consideration the matter determined to be improper. (*Ibid.*) 'Under [Evidence Code section 801,] subdivision (b), the matter upon which an expert's opinion is based must meet each of three separate but related tests. *First*, the matter must be perceived by or personally known to the witness or must be made known to him at or before the hearing at which the opinion is expressed. . . . *Second*, and without regard to the means by which an expert familiarizes himself with the matter upon which his opinion is based, the matter relied upon by the expert in forming his opinion must be of a type that reasonably may be relied upon by experts in forming an opinion upon the subject to which his testimony relates. . . . *Third*, an expert may not base his opinion upon any matter that is declared by the constitutional, statutory, or decisional law of this State to be an improper basis for an opinion.' [Citations.]" (*County Sanitation Dist.* v. *Watson Land Co.* (1993) 17 Cal.App.4th 1268, 1277.)

As to the contention that Lepowsky should have employed a different method of analysis, it is enough that the statistical method actually employed is a method generally accepted in the relevant scientific community, and thus produced evidence "of the type that reasonably may be relied upon by experts in forming an opinion upon the subject to which his testimony relates." (*County Sanitation Dist.* v. *Watson Land Co.*, *supra*, 17 Cal.App.4th at p. 1277.) Lepowsky employed what is termed a "one-tail" analysis. KGO's expert witness employed a "two-tail" analysis. Although KGO's expert testified that a two-tail analysis is preferable to a one-tail analysis, there is no evidence that a one-tail analysis is anything but a standard method of analysis or that it is in any way inaccurate.[4] That Lepowsky used a one-tail analysis, therefore, did not invalidate his

[4] It is true that at least one court has criticized the "one-tail" test, as favoring a finding of statistical significance, and as being inappropriate in cases involving large numbers of persons allegedly discriminated against. (*E.E.O.C.* v. *Federal Reserve Bank of Richmond* (4th Cir. 1983) 698 F.2d 633, 650, 655-656, revd. on other grounds 467 U.S.

testimony; it simply gave the jury an additional factor to consider in determining the persuasiveness of Lepowsky's conclusions. The same is true of KGO's argument that Lepowsky failed to determine whether his findings were outside the range of standard deviation. KGO asserts that the United States Supreme Court has declared that standard deviations of less than 2.0 must be disregarded as statistically significant, citing *Castaneda* v. *Partida* (1977) 430 U.S. 482, 496, footnote 17. The evidence, however, discloses that the one-tail method employed by Lepowsky determines statistical significance not by calculating a standard deviation, but by calculating the "P value." Lepowsky testified, "It's generally understood that P value smaller than five percent indicate a degree of surprise so great, that the result is said to be statistically significant." Lepowsky calculated the P value for the possibility that age played no role in KGO's terminations at 2.6, concluding that the results, therefore, were statistically significant. Thus, Lepowsky simply used an alternative to standard deviation and the tests requiring calculation of a standard deviation in order to determine statistical significance.[5]

In all events, neither the trial court nor this court is in any position to judge an expert's methodology. A party that desires to discredit the opinion of the other party's

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867.) This is not such a case. Moreover, the circuit court's opinion does not alter the fact that the "one-tail" test continues to be used by statisticians.

[5] In addition, the cases cited by KGO do not conclusively establish that any particular standard deviation is either significant or insignificant for purposes of determining discrimination against a protected class. The court in *Gay* v. *Waiters' and Dairy Lunchmen's Union* (9th Cir. 1982) 694 F.2d 531, 551, thus explained: "It would be improper to posit a quantitative threshold above which statistical evidence of disparate racial impact is sufficient as a matter of law to infer discriminatory intent, and below which it is insufficient as a matter of law. Indeed, if any rule of law can be isolated from the Supreme Court's decisions in *Castaneda* v. *Partida*, 430 U.S. 482, 496 n. 17 . . . it is that for sufficiently large samples, a variance between the expected and observed results of greater than 2 or 3 standard deviations is sufficient to make the data 'suspect' for a social scientist. . ." The court in *Gay* held that although a particular measure might render the data "suspect," it would be improper to find that a measure was either sufficient or insufficient as a matter of law as demonstrating the existence of a fact. (*Gay* v. *Waiters' and Dairy Lunchmen's Union, supra,* 694 F.2d at p. 551.)

expert has the opportunity to do so through cross-examination and through its own expert witnesses. KGO used both methods. KGO, in essence, is asking that we accept its own expert's analysis as the valid analysis and disregard the analysis performed by Davis's expert. We decline to do so. It is not at all uncommon for experts to have conflicting opinions about the conclusion that should be drawn from the evidence but it does not follow that the jury should hear the testimony of only one of the experts. An expert's opinion "is neither more nor less than evidence which is to be weighed and considered like any other evidence in the case, and a conflict between the opinions of two experts constitutes a conflict in the evidence." (*Southern Cal. Edison Co.* v. *Gemmill* (1938) 30 Cal.App.2d 23, 27.) Questions of the credibility of expert witnesses and the weight of their testimony, therefore, are questions for the jury in the first instance. (*Ibid.* at p. 27.)

For similar reasons we reject KGO's argument that Lepowsky chose too restricted a statistical pool, or picked an improper time frame. Lepowsky analyzed the terminations of persons acting as "general assignment reporters," meaning persons who worked exclusively as general assignment reporters or persons whose work primarily was that of a general assignment reporter. KGO complains that Lepowsky excluded from his pool of employees other types of on-air staff, such as anchors, weathercasters, sportscasters and medical reporters. (Lepowsky did include persons who worked as weekend anchors, but only if the majority of the time they worked as general assignment reporters. KGO's position is that because these other employees are on-air employees, supervised by the same person as general assignment reporters and employed under personal services contracts, they are in the same situation as general assignment reporters. There is evidence, however, that the duties of general assignment reporters are not the same as the duties of the other employees. Reporters not only report their stories on-air, but gather the facts and write the stories. Anchors do not ordinarily gather the facts and write the stories. They write introductions to the stories, working with the reporters and other employees in deciding what information to impart

to the viewers. In addition, there is evidence that KGO relied at least in part on audience surveys in deciding whether to continue the contracts of the other employees, but never conducted surveys to determine the popularity of its general assignment reporters. These distinctions provide a basis for Lepowsky's decision to concentrate only on general assignment reporters. Lepowsky also excluded from his pool of employees any employee hired after Davis was terminated, apparently on the assumption that KGO may have altered its practices in anticipation of a lawsuit. The assumption was not unreasonable. Once again, Lepowsky's choices go to the weight of his opinion but not to its competency. The trial court committed no abuse of discretion in permitting the jury to hear that opinion.

KGO's argument that Lepowsky erroneously concluded that certain of the employees in the pool had been terminated involuntarily again is an argument that concerns the weight, but not the admissibility, of Lepowsky's opinion. The argument is not based so much on the quality of the evidence Lepowsky considered in reaching his conclusions,[6] but on the assertion that the conclusions he reached were erroneous. For example, KGO and Davis differed in their views of whether it might be considered an involuntary termination for a 20-year employee to choose a cash settlement over a one-year contract. It is sufficient that reasonable minds could differ on the point, as reasonable minds could differ on the question of whether other of the terminations at issue were involuntary. In addition, we do not agree with KGO's contention that Davis was required to demonstrate that the terminations met the legal definition of constructive discharge. For purposes of Davis's case, the question was whether the

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[6] Lepowsky interviewed employees, considered KGO's responses to interrogatories and supplemental responses to interrogatories and reviewed the deposition testimony of the employee's supervisors. Although, as KGO points out, more than a little of the information received by Lepowsky was hearsay, it is settled that "hearsay information of a type *reasonably relied upon* by professionals in the field in forming an opinion on the subject may be used to support an expert opinion, even though not admissible in court. [Citations.]" (*Korsak* v. *Atlas Hotels, Inc., supra,* 2 Cal.App.4th at pp. 1523-1524, original italics.)

employees at issue had the option of continuing their employment with KGO. The jury heard evidence on the issue and undoubtedly considered it in weighing the value of Lepowsky's opinion. Thus, again, KGO's arguments that Lepowsky erred in concluding that an employee's termination was involuntary go to weight of the evidence and not to its competency.

To summarize, we find no abuse of discretion in the trial court's refusal to exclude Lepowsky's testimony, and further find that the verdict is supported by sufficient evidence.

II.

The Jury was Correctly Instructed as to Davis's Burden of Proof

As discussed above, once KGO introduced evidence from which it could be concluded that it had a legitimate reason for terminating Davis, the burden shifted to Davis to persuade the jury that the reason asserted by KGO was a mere pretext. (*Walker* v. *Blue Cross of California, supra,* 4 Cal.App.4th at p. 998.)

The "mere pretext" language has the potential for causing confusion. First, a plaintiff is not entitled to prevail simply by showing that the defendant's proffered reasons for termination are a pretext, although "[t]he factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of a prima facie case, suffice to show intentional discrimination." (*St. Mary's Honor Center, et. al.* v. *Hicks* (1993) 509 U.S. 502, 511.) The ultimate burden of showing discrimination still rests on the plaintiff. (*Id*. at p. 511.) In addition, it is possible that the reason asserted by the employer provides grounds for termination, but the employee in fact was terminated for an improper reason. In the present case, for example, it might be that KGO had cause to terminate Davis for his reporting style, but in fact it discharged him not for his style but for his age. It also might be that an employer terminates an employee for a combination of reasons only one or some of which are improper. In either case, the reason asserted by the employer may not be a "mere pretext" but the employer nonetheless improperly

terminated the employee. The cases, accordingly, hold that the plaintiff is required to prove a causal connection between his protected status and the employer's adverse action. The court in *Mixon* v. *Fair Employment & Housing Com., supra,* 192 Cal.App.3d 1306, 1319, for example, held: "While a complainant need not prove that racial animus was the sole motivation behind the challenged action, he must prove by a preponderance of the evidence that there was a 'causal connection' between the employee's protected status and the adverse employment decision." The court in *Ewing* v. *Gill Industries, Inc.* (1992) 3 Cal.App.4th 601, addressed the same problem when it recognized as proper an instruction that told the jury, "Accordingly, though there may be more than one factor in defendant's decision to terminate plaintiff's employment, plaintiff is entitled to recover if he establishes both: one, that one such factor was his age; and two, that in fact his age made a difference in determining whether or not the plaintiff was retained or terminated." (*Id*. at p. 609.) The court in *Clark* v. *Claremont University Center* (1992) 6 Cal.App.4th 639, 665, choosing different language, stated the same legal principle, explaining: "Many courts have used the term 'pretext' in describing the employee's burden of persuading the court that the employer's proffered explanation is unworthy of belief. [Citations.] The United States Supreme Court has explained that 'pretext' refers to 'but for' causation. [Citation.] The employee need not show 'he would have in any event been rejected or discharged solely on the basis of his race, without regard to the alleged deficiencies . . . .' [Citation.] [Thus, adopting the language from *Mixon, supra*], . . . '[w]hile a complainant need not prove that racial animus was the sole motivation behind the challenged action, he must prove by a preponderance of the evidence that there was a "causal connection" between the employee's protected status and the adverse employment decision.' [Citation.]"

In accordance with these principles, the jury in the present case was instructed:

"[P]laintiff retains the burden and must prove by a preponderance of all the evidence that age was a determining factor in defendant's decision to discharge plaintiff and/or not rehire him.

"One of the ways plaintiff can do this is to show that the reason or reasons offered by defendants was pretextual.

". . . . . .

"It is not necessary for plaintiff to prove that age was the sole or exclusive reason for defendants' decision to terminate him and/or not rehire him. There may be more than one factor in defendants' decision, but plaintiff must prove by a preponderance of the evidence that age was a determining factor."

This instruction is a correct statement of the law. The jury became confused, however, because they were given a special verdict form that attempted to express the same concept in a different way. Thus, the jury was asked in question 3 of the form: "Has Plaintiff proved by a preponderance of the evidence that Defendants' stated reason was a pretext for age discrimination *and that but for his age, Plaintiff would not have been terminated?*" (Emphasis added.) The jury found the emphasized portion of the instruction perplexing, and sent a note to the court, asking, "Does the phrase . . . 'that but for his age plaintiff would not have been terminated' . . . imply that age is *the* determining factor rather than *a* determining factor?" The court responded by instructing the jury with language from *Ewing* v. *Gill, supra,* 3 Cal.App.4th 601, 609: "Accordingly, though there may be more than one factor in defendant's decision to terminate plaintiff's employment, plaintiff is entitled to recover if he establishes both: one, that one such factor was his age; and, two that in fact his age made a difference in determining whether or not the plaintiff was retained or terminated."[7] The jury

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[7] KGO is incorrect in arguing that the court in *Ewing* found this language to be ambiguous. The plaintiff in *Ewing* complained that because of his age, his duties had been transferred over a period of time to other persons, after which he was fired. The defendant sought an instruction that the plaintiff was required to prove that a full-time job existed at the time of his termination in order to establish a prima facie case of age discrimination. The trial court rejected the defendant's instruction. It explained the plaintiff's burden of proof to the jury in general terms, including the language used by the trial court here. The trial court then tailored an additional part of the instruction to the facts of the case, telling the jury that the plaintiff was required to show, as part of his prima facie case, that his duties had been transferred to a substantially younger

thereafter modified the special verdict form, striking out the emphasized language and replacing it with the language taken from *Ewing*.

The verdict form, as modified, correctly stated the law, explaining that Davis was entitled to judgment even if KGO had a legitimate reason for terminating him, so long as Davis's age in fact had a causal connection to his termination. KGO, however, pointing out that the "but for" language used in the verdict form also is correct, contends that the modification of the verdict form was improper, and that by modifying it the jury applied an improper test in determining that Davis met his burden of proof. The contention lacks merit. As the full quotation from *Clark* discloses, the United States Supreme Court and the California courts interpret "but for" in the employment discrimination context as meaning that there must be a causal connection between the employee's protected status and his termination. The jury's confusion resulted from the fact that the "but for" language in the verdict form was taken out of context, with the result that they wondered if they could find in favor of Davis without finding that his age was the sole determining factor (i.e., *the* determining factor) in the decision to terminate him. When the court instructed the jury in accordance with *Ewing*, it provided them with a correct statement of the law, explaining what "but for" meant. The jury's act in striking out the emphasized portion of the instruction was not a

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employee or employees with equal or lesser qualifications. When the jury questioned this portion of the instruction, the court explained that it meant that a significant amount of the plaintiff's duties had been transferred. (3 Cal.App.4th at pp. 609-610.) The appellate court found that the tailored portion of the instruction was not misleading. It also noted, however, that the tailored portion of the instruction was only one part of the overall instructions and held, "Here the instructions, read in their entirety, informed the jury that Ewing was required to prove that his age was a determining factor in his termination. The trial court gave the 'determining factor' instruction to the jury five times. Thus, even assuming there was some ambiguity in the challenged instruction, it was not prejudicial since the instructions, when considered in their entirety, unambiguously required the jury to apply the appropriate standard." (*Id.* at pp. 611-612.) The court, therefore, found that the language of the instruction that was given to the jury in the present case removed any prejudice that might have resulted from the other language in the instruction.

rejection of the principles stated in cases such as *Clark*, but a rejection of the incorrect meaning at least some of the jurors were attaching to the phrase "but for." In all events, the language with which the jury was instructed, and which it adopted, was correct. The jury could not have answered question 3, as modified, in the affirmative without finding that Davis had established the requisite causal connection between his age and his termination. We find error neither in the instruction nor in the jury's apparent application of that instruction.

III.

It was not Error to Deny KGO's Motion for A New Trial For Attorney Misconduct

KGO made several motions in limine. In one, it sought a ruling prohibiting the introduction of lay opinions on any alleged pattern or practice of age discrimination. In another, it moved to limit questioning about KGO ex-employee Russ Coughlan who apparently had believed he was the subject of age discrimination and who died prior to trial. KGO's counsel explained, on the record, "As I understood our discussion in that area, we were really talking about individual circumstances of any person in addition to Coughlan who might be cited as examples of individual actions of age discrimination, and that at least at this stage that is not an appropriate argument nor admissible evidence." The court, clearly concerned about the time that would be consumed and confusion that would result were the parties to litigate whether other of KGO's employees had suffered age discrimination, ruled that it would be proper for Davis to show a pattern or practice of forcing out older long-term people, but that it would not be appropriate to go into individual cases.

KGO moved for a mistrial and later for a new trial in part on the grounds that Davis's counsel had violated the court's in limine ruling, and in so doing had prejudiced KGO's case. KGO complains that Davis's attorney violated the court's ruling by (1) eliciting information about the ages of persons hired by Weiss, (2) permitting expert witness William Lepowsky to explain why he had listed certain employees as

involuntary terminations, and (3) challenging a statement volunteered by Weiss that one of the over-40 employees who left during Weiss's tenure had resigned. As to this last point, counsel asked, "Sir, Carol Ivy was asked to sign a settlement release releasing the company of age discrimination claims in exchange for a settlement, right?" An objection to the question was sustained.

KGO argues here that the court erred in denying its motion for a new trial.

We find no error. The in limine rulings were designed to prevent the parties from litigating whether each and every person over the age of 40 who left KGO, left as a result of *age discrimination.* The questions asked and information imparted to the jury concerned only the age of the employee in question and whether that person's termination was *voluntary or involuntary*, and thus were relevant to the issue of pattern or practice of forcing out persons over the age of 40.[8] The questions about the ages of the persons hired during the period of time when Davis was being phased out and after he was terminated, were directly relevant to the fourth element of Davis's prima facie case: that others not in the protected class were retained in similar jobs, and/or Davis's job was filled by an individual of comparable qualifications not in the protected class. The jury was provided with no lay opinions as to whether any termination was the result of age discrimination. Indeed, there was no attempt to establish that the individuals at issue had in fact suffered age discrimination. The question about Carol Ivy was improper not because it sought to elicit the information that Ivy's termination had been involuntary, but because it incidentally referred to her discrimination claim. The trial court carefully distinguished between the proper and improper questions and responses, sustaining objections when appropriate, and when appropriate also instructing the jury

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[8] In accordance with its ruling the court instructed the jury that evidence regarding the treatment of other employees over the age of 40 was not to be considered by them in determining whether Davis had suffered age discrimination, that such evidence should be considered only as part of a statistical analysis involving the ages of employees in the KGO newsroom and that they could not consider the individual circumstances of any other situation as showing anything about age discrimination.

to disregard improper testimony. Although we find little improper conduct by Davis's attorney, we further conclude that any possible prejudice was cured by the court's admonitions and, in the context of the trial as a whole, little prejudice could have resulted from the improper references to age discrimination. It follows that the trial court correctly denied KGO's motion for a new trial for attorney misconduct. "It is only in the extreme case that the impropriety and prejudice of a lawyer's misconduct cannot be removed by an instruction to a jury to disregard it. [Citation.]" (*Hilliard* v. *A. H. Robins Co.* (1983) 148 Cal.App.3d 374, 407.) The present action is not such an extreme case.

IV.

It was not Error to Deny KGO's Motion for a New Trial For Juror Misconduct

KGO also sought a new trial for juror misconduct, submitting the affidavits of two jurors as evidence of the alleged misconduct. The two jurors declared that they learned that several jurors, including one of the declarants, watched KGO news. One juror "commented that he felt there were a lot of young reporters on the air and changed his vote in favor of plaintiff based on what he had seen." These jurors also declared that another juror told the others that she had a significant background in statistics. She told them that "based upon her experience, Mr. Lepowsky's methodology was better than Dr. Singleton's." "However, she also stated that both methods were accurate."

"It is well settled that a presumption of prejudice arises from any juror misconduct. . . . However, the presumption may be rebutted by proof that no prejudice actually resulted. [Citation.] A denial of a motion for new trial grounded on jury misconduct implies a determination by the trial judge that the misconduct did not result in prejudice. [Citation.] In reviewing the denial of a motion for new trial based on jury misconduct, the appellate court 'has a constitutional obligation [citation] to review the entire record, including the evidence, and to determine independently whether the act of misconduct, if it occurred, prevented the complaining party from having a fair trial. . . .

[Citation.] We must examine the record to determine whether there is a reasonable probability of actual harm to the complaining party resulting from the misconduct. Some of the factors to be considered in this connection are the strength of the evidence that misconduct occurred, the nature and seriousness of the misconduct, and the probability that actual prejudice may have ensued. [Citation.]" (*English* v. *Lin* (1994) 26 Cal.App.4th 1358, 1364; internal quotation marks omitted.) "Declarations recounting statements, conduct or events 'open to sight, hearing, and the other senses and thus subject to corroboration' are admissible to establish juror misconduct. Declarations submitted as proof of an individual juror's subjective reasoning processes, which can be neither corroborated nor disproved, are not. [Citations.]" (*Lankster* v. *Alpha Beta Co.* (1993) 15 Cal.App.4th 678, 681, fn. 1.)

We disregard the portion of the declarations concerning the thought process of the juror who allegedly changed his mind after watching KGO news. The remaining portions of the declarations, even if they establish misconduct, do not warrant reversal. It was undisputed that current KGO reporters are young. That one juror liked one expert's methodology better than the other's is inadmissible to the extent it reveals that juror's own thought processes. The juror, although apparently preferring the methodology of Davis's expert, stated that the methodology of KGO's expert also was accurate. It is inconceivable that this statement prevented KGO from receiving a fair trial. In any event, it is recognized and accepted that jurors bring their own experiences to their deliberations. " ' "Jurors, in weighing evidence, always exercise their judgment in the light of their own general knowledge of the subject in hand, whether instructed to do so or not; and a judgment will not be reversed whether they are or are not so instructed." ' [Citation.] [¶] . . . ' "In determining what is proper and what is improper discussion among jurors, regard must be had for the fact that the jury are supposedly men [and women] of different walks of life, avocations, and necessarily views that would be affected by their past experiences and situations. They could hardly arrive at a solution of their differences without discussion of the facts before them, and each

[person's] discussion would necessarily be tinged or affected by his own viewpoint and experience." ' " (*English* v. *Lin*, *supra*, 26 Cal.App.4th at p. 1365.) The trial court correctly denied KGO's motion for a new trial.

V.

Costs and Attorney Fees

Davis was awarded attorney fees of $290,030 and costs of $49,691.38, an award that apparently included expert witness fees. Government Code section 12965, subdivision (b) authorizes an award of attorney fees and costs to a party such as Davis. KGO contends, however (1) that the amount awarded as attorney fees was too high, and (2) that Davis was not entitled to expert witness fees.

Attorney Fees

KGO complains that lead attorney John McGuinn raised his hourly rate from $325 to $335 in May 1994, but the fee award reflects the greater rate for all of the time McGuinn spent on the case, resulting in an overpayment of $1,526.25. KGO complains that a second attorney's rates were billed at $150 per hour when, although she is an attorney and presumably performed the tasks of an attorney, she was not licensed to practice in California. In KGO's opinion she thus should have been billed at the rate for a paralegal. KGO argues that the award for hours spent by an associate at trial should be reduced because, again in KGO's opinion, the associate was not participating in the trial, but merely attending it for training purposes. Finally, KGO complains that Davis's attorneys were not entirely successful and that the fees awarded should be reduced to reflect only a limited success.

"It is well established that the determination of what constitutes reasonable attorney fees is committed to the discretion of the trial court, whose decision cannot be reversed in the absence of an abuse of discretion. [Citations.] The value of legal services performed in a case is a matter in which the trial court has its own expertise. [Citation.]" (*Melnyk* v. *Robledo* (1976) 64 Cal.App.3d 618, 623.) " 'The "experienced trial judge is the best judge of the value of professional services rendered in his court,

and while his judgment is of course subject to review, it will not be disturbed unless the appellate court is convinced that it is clearly wrong." ' [Citation.]" (*Montgomery* v. *Bio-Med Specialties, Inc.* (1986) 183 Cal.App.3d 1292, 1298.) We find no abuse of discretion here. The trial court clearly exercised its discretion, reducing the award of fees from $351,848.50 sought by Davis.[9] The court was in a position to determine the value of the contribution made by each of Davis's attorneys and apparently did so in fashioning its award. We see no reason to limit the court's discretion by insisting that its award reflect exactly the rate ordinarily charged by an attorney at any given point in time, or a reduced rate for an attorney not licensed to practice in this state. We also are not persuaded that the award to Davis should be reduced because Davis did not prevail against one defendant, was not awarded punitive damages and did not prevail on his motion for partial judgment notwithstanding the verdict. Davis prevailed on his claim against KGO, and thus is entitled to the fees incurred by him in prosecuting that claim. *Sokolow* v. *County of San Mateo* (1989) 213 Cal.App.3d 231, cited by KGO, is inapposite. The court in that case simply recognized that a trial court has the discretion to award only partial fees when a party has prevailed on only one or some of its claims. (213 Cal.App.3d at p. 248.) Davis here prevailed on his substantive claims. That he did not recover all of the *damages* he sought requires no reduction in attorney fees.

Expert Witness Fees

Davis claimed $52,254.80 as "out-of-pocket" litigation expenses, including $44,764.94 as expert witness fees. Government Code section 12965, subdivision (b) authorizes an award of attorney fees and costs, but is silent as to expert witness fees. Code of Civil Procedure section 1033.5 sets forth the items allowable as costs. These items include ordinary witness fees (subd. (a)(7)), and fees of experts ordered by the court (subd. (a)(8)). Section 1033.5 explicitly disallows as costs, except as authorized

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9 Davis actually sought twice this amount, or $703,697, arguing that the $351,848.50 should be viewed as a lodestar fee and should be multiplied by two on a private attorney general theory. (See *Crommie* v. *State of Cal., Public Utilities Com'n* (1994) 840 F.Supp. 719, *passim*.)

by law, "Fees of experts not ordered by the court." (§ 1033.5, subd. (b)(1).) Davis nonetheless contends that expert witness fees properly were allowed as an item of costs here. His arguments are that such an award is authorized by statute, or, in the alternative under the authority of *Bouman* v. *Block* (9th Cir. 1991) 940 F.2d 1211, *Beasley* v. *Wells Fargo Bank* (1991) 235 Cal.App.3d 1407, *California Housing Finance Agency* v. *E.R. Fairway Associates I* (1995) 37 Cal.App.4th 1508 and *Bussey* v. *Afflect* (1990) 225 Cal.App.3d 1162. We reject these arguments, concluding that the question of whether expert witness fees should be awarded as an item of costs rests with the Legislature, and that absent express Legislative authorization, expert witness may not be awarded by courts in actions, such as this, brought to vindicate private rights.

Finding no California case or statute precisely on point, we turn to federal law, recognizing, as noted above, that it provides no more than persuasive authority in actions brought under California law. (*Carr* v. *Barnabey's Hotel Corp.*, *supra*, 23 Cal.App.4th at p. 18; *Mixon* v. *Fair Employment & Housing Com.*, *supra*, 192 Cal.App.3d at pp. 1316-1317.) Like California law, federal law does not recognize expert witness fees as an ordinary element of costs. (28 U.S.C. §§ 1920, 1821(b).) A litigant, accordingly, may recover expert witness fees only if they are permitted by some overriding authority. The majority of the laws prohibiting discrimination in employment are set forth in the Civil Rights statutes of Title VII of the United States Code, 42 United States Code sections 2000e, et seq. Section 2000e-5, subdivision (k) expressly authorizes an award of "a reasonable attorney's fee (*including expert fees*) as part of the costs." (Emphasis added.) Age discrimination, however, is not a Title VII violation. Rather, it is prohibited by the provisions of the Age Discrimination in Employment Act (ADEA), 29 United States Code sections 621-634. Section 626 authorizes civil actions by persons claiming injury resulting from age discrimination (subd. (c)), and refers to 29 United States Code section 216 as setting forth the powers, remedies and procedures to be employed in such actions. (Subd. (b).) Unlike 41 United States Code section 2000e-5, subdivision (k), section 216, subdivision (b) does

not expressly authorize an award of expert witness fees, providing only that the court "shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action."

The distinction between these provisions of Title VII and the ADEA have historical significance. Prior to the decision in *Alyeska Pipeline Service Co.* v. *Wilderness Society* (1975) 421 U.S. 240, federal courts recognized in themselves the authority to shift attorney fees from a prevailing plaintiff to a losing defendant on a theory of private attorney general. At least some courts on the same theory also shifted expert witness fees to the losing defendant. (See *West Virginia Univ. Hospitals, Inc.* v. *Casey* (1991) 499 U.S. 83, 92-93, and cases cited there.) The Supreme Court in *Alyeska* concluded that courts have no power to shift attorney fees without express legislative authorization, finding that whether attorney fees should be awarded is a policy matter that the Legislature has reserved to itself. "Since the approach taken by Congress to this issue has been to carve out specific exceptions to a general rule that federal courts cannot award attorneys' fees . . . those courts are not free to fashion drastic new rules with respect to the allowance of attorneys' fees to the prevailing party in federal litigation or to pick and choose among plaintiffs and the statutes under which they sue and to award fees in some cases but not in others, depending upon the courts' assessment of the importance of the public polices involved in particular cases." (*Alyeska Pipeline Service Co.* v. *Wilderness Society, supra*, 421 U.S. at p. 269.) The Legislature responded to *Alyeska* by amending certain statutes (the so-called "fee-shifting" statutes) to expressly authorize awards of attorney fees. As pre-*Alyeska* law had held that attorney fees included expert witness fees, a question arose as to whether these fee-shifting statutes should be interpreted to include expert witness fees. This question was answered in the negative by the Supreme Court in *Crawford Fitting Co.* v. *J.T. Gibbons* (1987) 482 U.S. 437, 439 and *West Virginia Univ. Hospitals, Inc.* v. *Casey*, *supra*, 499 U.S. at p. 92. The court in *West Virginia Hospitals* explained that notwithstanding such pre-*Alyeska* cases as had implied that expert witness fees might be

an element of attorney fees, the two are separate elements of litigation costs. (499 U.S. at p. 89.) The court found it significant that Congress expressly shifted attorney fees *and* expert witness fees in some statutes amended or enacted after *Alyeska,*[10] but did not mention expert witness fees in other statutes. These others included 42 United States Code sections 1988 and 2000e-5 under Title VII, which had been amended to shift attorney's fees in Civil Rights actions. "Congress could easily have shifted 'attorney's fees and expert witness fees,' or 'reasonable litigation expenses,' . . . ; it chose instead to enact more restrictive language, and we are bound by that restriction." (*West Virginia Univ. Hospitals, Inc.* v. *Casey, supra,* 499 U.S. at p. 99.) Congress responded by amending 42 United States Code sections 1988 and 2000e-5, subdivision (k), to expressly authorize an award of expert witness fees in addition to attorney fees. Congress, however, did not similarly amend 29 United States Code sections 216(b) and 626(b). The result is that expert witness fees are not recoverable under the ADEA. (*Gray* v. *Phillips Petroleum Co.* (10th Cir. 1992) 971 F.2d 591, 594-595.) Thus, under federal law, expert witness fees may not be awarded as an ordinary element of costs and may not be awarded absent express, explicit statutory authorization. In addition, expert witness fees are not an element of attorney fees and may not be awarded simply because an award of attorney fees is authorized by statute.

Government Code section 12965, of course, is not part of the ADEA, and the fact that expert witness fees are not recoverable under the ADEA does not compel the conclusion that they may not be recovered under section 12965. Nonetheless, like the United States Congress, California's Legislature has responded to cases such as *Alyeska, supra*. California's Private Attorney General Statute, Code of Civil Procedure section 1021.5 was such a response. (*Beasley* v. *Wells Fargo Bank, supra*, 235 Cal.App.3d at p. 1420.) The Legislature, however, which expressly has authorized awards of expert

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10 E.g., 15 U.S.C. §§ 2618(d), 2619(c)(2) (the Toxic Substances Control Act); 15 U.S.C. §§ 2060(c), 2072(a), 2073 (the Consumer Product Safety Act); 42 U.S.C. 6972(e) (the Resource Conservation and Recovery Act of 1976).

witness fees in a number of a actions,[11] has not expressly authorized them in age discrimination cases, providing only that attorney fees and costs are available. It follows that expert witness fees may be awarded in age discrimination cases only if they are available absent express legislative authorization, or if Government Code section 12965's authorization for an award of costs *is* express Legislative authorization for an award of expert witness fees.

We decline to find that expert witness fees may be awarded absent express statutory authorization. Although, as noted, we are not bound by the decisions in the federal court cases, it is persuasive that they represent a substantial body of federal law that has litigated exactly this question, under an analogous statute, and has reached the same conclusion. It is true, as Davis points out, that the court in *Beasley* v. *Wells Fargo Bank, supra,* 235 Cal.App.3d 1407, upheld an award of expert witness fees in an action brought on a private attorney general theory under Code of Civil Procedure section 1021.5. The present case is not such an action. Although this case in a sense furthers the important public interest against age discrimination, there is no question but that Davis brought the action not in order to benefit the public, but in order to obtain personal compensation for KGO's wrongful acts. "Section 1021.5 is intended as a 'bounty' for pursuing public interest litigation, not a reward for litigants motivated by their own interests who coincidentally serve the public. [Citations.] 'The private

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11 "(E.g., Business and Professions Code section 8768.5 (actions to compel county surveyor to file record of survey); Civil Code sections 987, subdivision (e)(4) and 989, subdivision (f)(1) (actions to protect artwork from alteration or destruction); Civil Code section 1745, subdivision (d) (actions against art dealer for lack of full disclosure); Civil Code section 7011 [now Family Code section 7640] (paternity actions); Code of Civil Procedure section 1036 (inverse condemnation actions); Code of Civil Procedure section 1038, subdivision (b) (pretrial dispositions in bad faith actions for indemnity/contribution or under the Tort Claims Act); Code of Civil Procedure section 1235.140 (eminent domain actions); Corporations Code section 1305, subdivision (e) (actions to determine fair market value of dissenting shares); Government Code section 8670.56.5, subdivision (e), and Harbors and Navigation Code section 294, subdivision (e) (actions for damages from oil spill)." (*Beasley* v. *Wells Fargo Bank, supra*, 235 Cal.App.3d 1407, 1420, fn. 5.)

attorney general theory recognizes citizens frequently have common interests of significant societal importance, but which do not involve any individual's financial interests to the extent necessary to encourage private litigation to enforce the right. [Citation.] To encourage such suits, attorneys fees are awarded when a significant public benefit is conferred through litigation pursued by one whose personal stake is insufficient to otherwise encourage the action.' [Citations.]" (*California Licensed Foresters Assn.* v. *State Bd. of Forestry* (1994) 30 Cal.App.4th 562, 570; and see also *Satrap* v. *Pacific Gas & Electric Co.* (1996) 42 Cal.App.4th 72, 76-77.) That expert witness fees, or indeed attorney fees, might be awarded in the absence of express legislative authority in private attorney general actions thus results in part from the special equities that apply in such cases. (See *Beasley* v. *Wells Fargo Bank, supra*, 235 Cal.App.3d at pp. 1420-1421; *Woodland Hills Residents Assn. Inc.* v. *City Council* (1979) 23 Cal.3d 917, 930; *Serrano* v. *Priest* (1977) 20 Cal.3d 25, 46-48.) As the present case does not meet the criteria for an action brought on a private attorney general theory, these equities do not exist and provide no basis for departing from the approach adopted by the federal courts. The only other case that has addressed this question at all is *Bouman* v. *Block, supra,* 940 F.2d 1211. The court in that case, however, after correctly finding that Government Code section 12965 authorizes an award of costs, simply upheld an award of expert witness fees under section 12965 as an item of costs without citing any authority for that proposition or engaging in any analysis of the relevant legal authority. (*Id.* at p. 1237.[12]) The summary and conclusory nature of the decision, virtually devoid of reasoning, undermines its value as

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12 The court thus held: "Under the California Fair Employment and Housing Act, the court may award costs to the successful party. Cal.Gov.Code § 12965(b). When a plaintiff proceeds under multiple theories and prevails on her FEPA claims, she is entitled to attorney's fees under FEPA. *See generally Ackerman v. Western Electric Co., 860 F.2d 1514 (9th Cir.1988); Stache v. International Union of Bricklayers and Allied Craftsmen, 852 F.2d 1231 (9th Cir.1988).* The district court had discretion to award costs under the California statute and did not abuse its discretion in doing so." (*Bouman* v. *Block*, *supra*, at p. 1237.)

authority. (*City of Berkeley* v. *Superior Court* (1980) 26 Cal.3d 515, 533.) In short, the bulk of relevant legal authority, and the authority we find persuasive, holds that with the exception of fees awarded under a private attorney general theory, expert witness fees may not be awarded to a prevailing party in the absence of express statutory authority.

The remaining question is whether Government Code section 12965 should be construed as providing such express statutory authority. Section 12965, subdivision (b) expressly authorizes an award of "costs" to the prevailing party. Davis points out that expert witness fees are an element of "costs," arguing that by specifying that costs may be awarded, the Legislature must have intended that any costs actually incurred in litigation, including expert witness fees, may be awarded. As noted above, however, expert witness fees ordinarily are not an *allowable* item of costs. Thus, Code of Civil Procedure section 1032 sets forth the general rule that a party who prevails at trial is entitled to its costs as matter of right. Code of Civil Procedure section 1033.5 limits the items of costs available to such a prevailing party, providing, as relevant here, that expert witness fees for experts not ordered by the court are not an allowable item of costs. (§ 1033.5, subd. (b)(1).) Davis argues that costs allowable under section 12965 should not be considered co-extensive with costs available to a prevailing party under section 1032, pointing out that a contrary finding would create a redundancy rendering section 12965's allowance of costs superfluous. Davis is correct. This redundancy can be avoided, however, only by construing the term "costs" in section 12965 to include items not allowable as costs under section 1033.5, a construction that suggests a certain amount of legislative capriciousness. In addition, that the Legislature has directly and unambiguously authorized awards of expert witness fees in some statutes argues against a conclusion that a less clear directive should be construed as authorizing such awards. On balance, and in the absence of some clear expression of legislative intent, it seems to us preferable to interpret the term "costs" in accordance with the ordinary usage of the term in the context of costs awarded to prevailing parties. Faced with a similar question, the court in *Gray* v. *Phillips Petroleum Co., supra,* 971 F.2d 591 reached a

similar conclusion in its analysis of 29 U.S.C. § 216, incorporated into the ADEA. Section 216 provides that the district court may award a reasonable attorney's fee and costs of the action. As here, the prevailing party in *Gray* argued that the term "costs" should be interpreted to include expert witness fees in order to avoid the redundancy that would result by interpreting it to include only those items ordinarily allowable as costs under 28 U.S.C. §§ 1821 and 1920. The court held: "While we are reluctant to read redundancy into a federal statutory scheme, we are bound by the Supreme Court's pronouncement that the limit on witness fees provided in 28 U.S.C. § 1821 can be lifted only when there is 'plain evidence of congressional intent to supersede' §§ 1920 and 1821." (*Gray* v. *Phillips Petroleum Co., supra,* 971 F.2d at p. 595.) Unlike the federal court we are not bound by the Supreme Court's pronouncement. We have, however, adopted the Supreme Court's reasoning and, like the *Gray* court, cannot find in the use of the term "costs" a legislative intent to supersede the limitations on costs set forth in Code of Civil Procedure section 1033.5.

Davis cites *Bussey* v. *Afflect, supra,* 225 Cal.App.3d 1162, where it was concluded that costs such as expert witness fees might be awarded under a contract providing for an award of " 'all costs and expenses of collection including reasonable attorneys fees.' " (*Id.* at p. 1164.) *Bussey* was decided before the Supreme Court decided *West Virginia Univ. Hospitals, Inc.* v. *Casey, supra,* 499 U.S. 83. To the extent that the *Bussey* decision rests on the conclusion that expert witness fees may be deemed an item of attorney fees, relying on federal case law, its value as authority is undermined by the Supreme Court's subsequent disapproval of those federal cases reaching similar conclusions. In addition, the decision in *Bussey* was based on the court's interpretation of a contract awarding costs, rather than on a statute awarding costs. The court accordingly concluded that by contract the parties may award items of costs not ordinarily allowable under section 1033.5. (*Id.* at p. 1167.) The contract at issue in *Bussey* certainly was susceptible to the interpretation that the parties intended that all actual costs would be awarded, as opposed only to those allowable under Code of Civil

Procedure section 1033.5. In addition, the decision in *Bussey* has been criticized on exactly this point. The court in *Ripley* v. *Pappadopoulos* (1994) 23 Cal.App.4th 1616, disagreeing with the reasoning of the court in *Bussey*, and citing *West Virginia Hospitals, Inc.* v. *Casey*, held: "When the numerous statutory provisions in which expert witness fees are expressly declared recoverable are considered together with the express prohibition against the inclusion of such fees in a cost award otherwise, the Legislature's intent becomes clear. The Legislature has reserved to itself the power to determine selectively the types of actions and circumstances in which expert witness fees should be recoverable as costs and such fees may not otherwise be recovered in a cost award." (*Id.* at pp. 1624-1625.) Finally, the court that decided *Ripley* also decided *California Housing Finance Agency* v. *E.R. Fairway Associates I, supra*, 37 Cal.App.4th 1508, cited by Davis as supporting the argument that the term "costs" in statutes such as Government Code section 12695 ordinarily should be construed as meaning all actual costs of litigation, whether or not allowable under Code of Civil Procedure section 1033.5. We read *California Housing* as supporting the opposite argument. The court in that case found that costs not allowable under Code of Civil Procedure section 1033.5 might be recovered under the authority of Health and Safety Code section 51205. The finding was based on the specific language of section 51205 providing, "Notwithstanding any other provision of law, the prevailing party in any action instituted pursuant to this section shall be awarded costs and reasonable attorney's fees, in an amount to be determined in the court's discretion." The court concluded: "The introductory phrase of section 51205(f), '[n]otwithstanding any other provisions of law,' qualifies the operative language of the section entitling the prevailing party to recover 'costs and reasonable attorney's fees." Thus 'any other provision of law' relating to costs, to the extent contrary to or inconsistent with section 51205(f), is subordinated to the latter provision. This would include Code of Civil Procedure section 1033.5, subdivision (b) which specifies items 'not allowable as costs except when expressly authorized by law.' This analysis is buttressed by the final

clause of section 51205(f) which allows costs 'in an amount to be determined in the court's discretion.' Ordinarily, the prevailing party is entitled 'as a matter of right' to those costs which are allowed by statute. (Code Civ. Proc., §§ 1032, subd. (b), 1033.5, subd. (a).) The express language of section 51205(f) that costs be awarded 'in an amount to be determined in the court's discretion' strongly implies that the limitations on cost awards set forth in Code of Civil Procedure section 1033.5, subdivision (b) do not apply in [actions brought pursuant to section 51205]." (*California Housing Finance Agency* v. *E.R. Fairway Associates I, supra,* 37 Cal.App.4th at pp. 1515-1516.) The holding, accordingly, supports the argument that a statute that lacks such language and simply provides for an award of costs permits an award only of such costs as are allowable under section 1033.5. Government Code section 12695 contains none of the language found significant by the court in *California Housing*. In this respect it is also relevant that the court in *West Virginia Univ. Hospitals, Inc.* v. *Casey, supra*, 499 U.S. 83, surveying pre-*Alyeska* caselaw, noted that the courts routinely declined to award expert witness fees under a statute authorizing awards of " 'the cost of suit, including a reasonable attorney's fee.' " (*Id.* at p. 94.)

For all of these reasons we conclude that nothing in the case law, and nothing in section 12695 itself, authorizes an award of expert witness fees in actions such as this. The matter will be remanded so that the trial court can recalculate its costs award.

DAVIS'S CROSS-APPEAL

Davis complains that the jury reduced the damages awarded to him, finding that KGO had proved that by exercising reasonable efforts Davis could have obtained comparable employment that would have earned him $260,160, and that it awarded him nothing for emotional distress. Davis contends that the jury's findings on these issues were not supported by the evidence, and that the trial court therefore erred in denying his motion for partial judgment or a new trial on the issue of damages.

"The general rule is that the measure of recovery by a wrongfully discharged employee is the amount of salary agreed upon for the period of service, less the amount

which the employer affirmatively proves the employee has earned or with reasonable effort might have earned from other employment. [Citations.] However, before projected earnings from other employment opportunities not sought or accepted by the discharged employee can be applied in mitigation, the employer must show that the other employment was comparable, or substantially similar, to that of which the employee has been deprived; the employee's rejection of or failure to seek other available employment of a different or inferior kind may not be resorted to in order to mitigate damages. [Citations.]" (*Parker* v. *Twentieth Century-Fox Film Corp.* (1970) 3 Cal.3d 176, 181-182.)

KGO introduced the testimony of George Fitzpatrick, a television news headhunter, who locates people for positions in television in the United States and Canada. Fitzpatrick's clients include CBS News, ABC News, NBC News, Fox Broadcasting, NBC owned and operated television stations, CBS owned and operated television stations, Fox Broadcasting owned and operated television stations, CNN and ESPN. His company works for all the televisions stations in San Francisco, Sacramento and Los Angeles. Fitzpatrick testified that in his opinion a person seriously interested in finding a job in television would send a videotape to his organization. Such a person would also send a tape to the four or five major consulting companies and would look at job listings in the back of the trade magazines. Fitzpatrick further testified that in his opinion, and based upon his knowledge of the market, although Davis probably would not have been able to find work at a major station in one of the 20 or so largest markets,[13] such as New York, Los Angeles or San Francisco, he could have found a position in a small or medium-sized market, or at a less major station in the Bay Area. Fitzpatrick pointed out a number of CBS affiliates had switched to Fox Broadcasting in 1994 with the result that they lost CBS news programs and had to find news programs

[13] Fitzpatrick was used by KGO as a witness on the issue of the reason for Davis's termination, and testified that Davis's style of reporting was no longer appropriate for the major markets.

to fill in the lost time. "So since May 1st of 1994 through the current time, there's approximately 2,000 jobs that are available in broadcasting today that didn't exist prior to May 1st." He believed that it "would be well worth their while" for such stations to hire someone with Davis's years of experience, "because it gives them extra credibility." Jobs in the marketplaces Fitzpatrick had in mind would pay as low as $35,000 and as high as $75,000.

There was no evidence that Davis had submitted a tape to a headhunting agency. Davis did not consult the trade magazine advertisements. Davis testified that he talked with people at major Bay Area television stations, Channels 2, 4, 5 and 9. He talked with a couple of people he knew at Los Angeles stations. He met with a talent agent to whom he provided an audition videotape. He spoke with another agent, apparently in order to obtain contacts for voice-over work, and went to auditions for such work. The audition tape he had prepared was sent to CNN. In the time since his discharge he had obtained only a single, free-lance news reporter job. Although he expressed a willingness to relocate if he could support himself and it was a decent place, Davis apparently had not applied for any job outside of San Francisco except for sending the tape to CNN. There was no evidence that Davis had applied for a job at one of the smaller stations. Davis admitted that he hadn't communicated with his agent in 1992 and not much in 1993.

Our duty is not to reweigh the evidence, but simply to determine whether there is any substantial evidence, conflicting though it may be, to support the verdict. (*County of Mariposa* v. *Yosemite West Associates, supra*, 202 Cal.App.3d at p. 807; *Meyer* v. *Byron Jackson, Inc.* (1984) 161 Cal.App.3d 402, 417.) There was evidence here from which the jury could conclude that Davis would have obtained a comparable position had he tried harder to do so. Indeed, the more persuasive Davis's own evidence on the issue of wrongful termination, such as the statement of one witness that "if I were a new[s] director, I'd hire him tomorrow," the more persuasive the evidence that Davis could have obtained comparable employment. It is true, as Davis points out, that KGO

did not conclusively establish that he would have obtained another position. It is enough, however, that there was evidence from which the jury could conclude that Davis would have been hired.

Davis also complains that the jury must have found that he could have mitigated his damages by accepting employment at some location other than the Bay Area. It is true that it has been held that a plaintiff need not accept employment in another location in order to mitigate his damages. (*Cunningham* v. *Retail Clerks Union* (1983) 149 Cal.App.3d 296, 306-307.) The jury, however, was never instructed in accordance with this holding, and the record does not disclose that Davis ever sought such an instruction, or that he sought to exclude evidence of availability of employment at other locations. Any error in the jury's understanding of the law has been waived. (*Agarwal* v. *Johnson* (1979) 25 Cal.3d 932, 948-949.) In addition, the holding of cases such as *Cunningham* should be tempered by the reality of a particular plaintiff's situation and line of work. Where, as here, there is evidence that there are only a limited number of comparable positions available in a particular geographic area, where there is evidence that persons in Davis's line of work routinely move from place to place and where there was no evidence that relocation would have caused Davis undue inconvenience or hardship, or separated him from his family, reasonable efforts at finding employment might include reasonable relocation. (See *Cowen* v. *Standard Brands, Inc.* (N.D. Ala.1983) 572 F.Supp. 1576, 1581-1582 and *Hopkins* v. *Price Waterhouse* (D.C. Cir. 1990) 737 F.Supp. 1202, 1214.) *Parker, supra,* does not mandate otherwise. Twentieth Century breached a contract with actress Shirley MacLaine Parker under which she was to have a starring role in a motion picture. It offered her a role in a second motion picture, which offer Parker declined. Twentieth Century argued that Parker's damages should have been reduced by the amount she would have earned under the declined contract. The court concluded that the second contract did not offer Parker comparable employment. In reaching this conclusion, the court considered the type of role and the fact that Parker had approval rights over the director and screenplay of the first motion

picture, but would not have approval rights in the second. It is noteworthy, however, that the court, although mentioning that the first picture would be filmed in Los Angeles, while the second was to take place in an opal mine in Australia, did not rely on this fact in deciding that the employment was not comparable. The question in all cases simply is whether a plaintiff by reasonable efforts could have obtained comparable employment. There are some cases in which it would be appropriate to find as a matter of law that it would be unreasonable to require an employee to relocate in order to mitigate his damages. In other cases, whether an employee should consider relocation presents an issue of fact. This is such a case, and we can find no error in permitting the jury to hear of the availability of employment at locations other than the Bay Area.

The jury was instructed that it could award damages for emotional distress, defined for the jury as: "mental distress, mental suffering or mental anguish. It includes all highly unpleasant mental reactions such as fright, nervousness, grief, anxiety, worry, mortification, shock, humiliation and indignity as well as physical pain." (See *Stephens* v. *Coldwell Banker Commercial Group, Inc.* (1988) 199 Cal.App.3d 1394, 1402.) Here, Davis testified generally as to the loss of self confidence he experienced after being told he was to be terminated, characterizing it as a feeling of panic that he would not be able to do the work. He felt angry and frustrated. He also candidly testified that he felt that he had handled "it as well as can be expected of someone who's been at a place for as long as I was there and is no longer there and has good reason to doubt the prospects of continuing similar—closely similar employment. [¶] I don't know that I'm damaged more than anyone under those circumstances would be. I can't make that judgment." Although Davis stated that he sometimes woke up at night, there was no evidence that his discharge caused him physical illness, nor was there evidence that it caused him the kind of mental stress that requires professional assistance. The jury was entitled to conclude that Davis's mental reaction, although undoubtedly unpleasant, was not the kind of highly unpleasant reaction supporting an award of damages.

CONCLUSION

The award of costs is reversed and the matter remanded to the trial court for a redetermination of costs in accordance with the principles discussed in this opinion. In all other respects the judgment is affirmed. Davis is entitled to the costs and reasonable attorney fees incurred by him in responding to KGO's appeal. KGO is entitled to any costs incurred by it in responding to Davis's cross-appeal.

CERTIFIED FOR PARTIAL PUBLICATION.

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Stein, Acting P.J.

We concur:

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Dossee, J.

_____
Swager, J.

Trial Court:	Superior Court City and Count of San Francisco
Trial Judge:	Honorable Raymond J. Arata, Jr.
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